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IN THE COURT OF APPEALS OF INDIANA

ROBERT J. SZABO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0509-CR-459
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jeanne M. Jourdan, Judge
Cause No. 71D05-9301-CF-66

September 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Robert J. Szabo ("Szabo") appeals his twenty-eight year aggregate sentence following his pleas of guilty to Burglary, a Class B felony,[1] and Robbery, a Class C felony.[2] We affirm.

Issues

Szabo presents three issues for review:

I. Whether the sentence was imposed in violation of Blakely v. Washington, 542 U.S. 296 (2004), reh'g denied;

II. Whether the trial court abused its discretion by ignoring mitigating evidence; and

III. Whether the sentence is inappropriate.

Facts and Procedural History

During the early morning hours of December 31, 1992, Szabo and Carlos Kirkendolph ("Kirkendolph") "went looking to do a burglary" in South Bend. (Tr. 18.) They targeted the home of H.P., a sixty-five-year-old woman who lived alone. Szabo brought along a screwdriver, which was used to break into a window. They awakened H.P. and demanded money. After successfully ransacking the house, the pair found jewelry and $30.00. Kirkendolph then raped H.P.

On January 19, 1993, the State charged Szabo with Burglary, Robbery and Rape, as a Class A felony.[3] On April 20, 1993, he pleaded guilty to burglary and robbery pursuant to a

[1] Ind. Code § 35-43-2-1.
[2] Ind. Code § 35-42-5-1.

plea agreement. Sentencing was left to the trial court's discretion. On May 20, 1993, the trial court sentenced Szabo to consecutive terms of twenty years for Burglary and eight years for Robbery.

On March 3, 2005, Szabo filed a pro se petition for leave to file a belated notice of appeal. On August 25, 2005, Szabo, by counsel, filed an amended petition. On August 24, 2005, Szabo was granted leave to pursue a belated appeal, and on that same day he filed his belated notice of appeal.

Discussion and Decision

I. Right to Jury Determination of Aggravating Circumstance

At the time Szabo was sentenced, Indiana Code Section 35-50-2-5 provided that a person who committed a Class B felony should be imprisoned for a fixed term of ten years, with not more than ten years added for aggravating circumstances, and not more than four years subtracted for mitigating circumstances. Indiana Code Section 35-50-2-6 provided that a person who committed a Class C felony should be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances and not more than two (2) years subtracted for mitigating circumstances. The trial court imposed the maximum possible sentences after finding no mitigators and finding aggravators as follows:

> There are only aggravating circumstances. And your behavior up until this point in a juvenile Court is an aggravating circumstance. You have continued to commit crimes, and each time – or at least this time the burglary didn't limit itself to simply going into someone else's house and stealing. This time there was a direct confrontation and robbery. The victim was over sixty-five years old and you terrorized that lady by your behavior. I do not see you as the

[3] Ind. Code § 35-42-4-1.

> follower and Mr. Kirkendolph as the term [sic] leader. I see you acting together.

(Tr. 60.) Szabo now contends that the finding of the victim's age as an aggravator is in violation of his Sixth Amendment right to have a jury determine whether or not there existed aggravating circumstances to support his sentence enhancement, according to Blakely.[4] The Blakely court applied the rule set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Blakely court defined the relevant statutory maximum for Apprendi purposes as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

In Smylie, our Supreme Court applied Blakely to invalidate portions of Indiana's sentencing scheme that allowed a trial court, without the aid of a jury or a waiver by the

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[4] The State argues that Szabo cannot invoke Blakely because his sentencing hearing was conducted in 1993. We disagree. The Indiana Supreme Court's rule that precludes retroactive application of new criminal rules to collateral proceedings does not apply to direct appeals brought pursuant to Post-Conviction Rule 2. Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005) (citing Fosha v. State, 747 N.E.2d 549, 552 (Ind. 2001) (holding that defendant's claim based on Richardson v. State, 717 N.E.2d 32 (Ind. 1999), would be considered on the merits, where defendant was convicted in 1993 and did not originally timely file a direct appeal but in 1999 was granted permission to file a belated appeal)). "New rules for the conduct of criminal prosecutions are to be applied retroactively to cases pending on direct review or not yet final when the new rules are announced." Powell v. State, 574 N.E.2d 331, 333 (Ind. Ct. App. 1991), trans. denied. Post-Conviction Rule 2(1) provides in pertinent part: "If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period." (emphasis added.) Because Szabo was given permission to file this belated direct appeal, he may rely on Blakely even though he was sentenced before it was decided because his case was "not yet final" when Blakely was decided. See Smylie v. State, 823 N.E.2d 679, 690-91 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005) (holding that defendants sentenced before Blakely was handed down, but whose appeals were "on direct review" on that date, may raise a Sixth Amendment challenge to his or her sentence for the first time on appeal). See also Gutermuth v. State, 848 N.E.2d 716 (Ind. Ct. App. 2006) (concluding that the appellant bringing a belated direct appeal was entitled to the retroactive application of Blakely because his case was not yet final when Blakely was decided), trans. granted. But see Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005) and Robbins v. State, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005).

defendant, to enhance a sentence where certain factors were present. Smylie, 823 N.E.2d at 682-84. Here, however, Szabo has a lengthy history of juvenile adjudications. Juvenile adjudications require proof beyond a reasonable doubt and, accordingly, the finding of a juvenile history is exempt from the Apprendi rule as clarified in Blakely. See Ryle v. State, 842 N.E.2d 320, 322 (Ind. 2005), pet. for cert. filed May 12, 2006.

Szabo did not admit the age of the victim, and it was not a fact found by a jury. However, in a case where a trial court has relied on some Blakely-permissible aggravators and others that are not, the "sentence may still be upheld if there are other valid aggravating factors from which we can discern that the trial court would have imposed the same sentence." Edwards v. State, 822 N.E.2d 1106, 1110 (Ind. Ct. App. 2005). Here, Szabo had four juvenile adjudications for committing acts that would have been burglaries if committed by an adult. The first was committed when Szabo was eleven years old. Additionally, he was adjudicated a delinquent for acts that would be criminal trespass, theft, and shoplifting if committed by an adult. Given the consistent history of home invasion and property offenses, we are confident that the trial court would have imposed the maximum sentence based upon Szabo's extensive juvenile history, without any additional findings.

II. Failure to Recognize Mitigators

Szabo next contends that the trial court erred in failing to find his guilty plea and his youth to be mitigating circumstances. Szabo was seventeen at the time of the instant offenses.

The trial court is not obligated to accord the same weight to a factor that the defendant considers mitigating or to find mitigators simply because they are urged by the defendant. Klein v. State, 698 N.E.2d 296, 300 (Ind. 1998). Rather, it is within the trial court's discretion to determine whether mitigating circumstances are significant and what weight to accord to the identified circumstances. Kelly v. State, 719 N.E.2d 391, 395 (Ind. 1999), reh'g denied. Moreover, the trial court is not required to explain why it did not find a certain factor to be significantly mitigating. Dunlop v. State, 724 N.E.2d 592, 594 (Ind. 2000), reh'g denied.

"Age is neither a statutory nor a per se mitigating factor." Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). We observe that Szabo did not present evidence at the sentencing hearing to establish why age should have been considered a mitigating factor in his particular case.

Indiana courts have recognized that a guilty plea is a significant mitigating factor in some circumstances because it saves judicial resources and spares the victim from a lengthy trial. Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004). Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned. Sensback, 720 N.E.2d at 1164. However, a guilty plea is not automatically a significant mitigating factor. Id. at 1165.

Here, the record demonstrates that the most serious charge against Szabo, Rape as a Class A felony, was dismissed in exchange for his plea of guilty to the remaining charges.[5]

Szabo claims that proof against him was meager and he thus received a marginal benefit from the dismissal. We disagree. The victim reported to police that Szabo held her down with a "knife-like object" while another person raped her. The State's forensic evidence corroborated the victim's statement. Accordingly, the proof that Szabo was guilty of aiding and abetting rape, as charged, was not facially weak. Szabo received a significant benefit in exchange for his guilty plea, and the trial court did not abuse its discretion by failing to accord him an additional benefit in sentencing.

III. Appropriateness of Sentence

Szabo also argues that his aggregate twenty-eight-year sentence is inappropriate in light of the nature of the offenses and the character of the offender. In particular, he points out that he was seventeen years old, had dropped out of high school, had a drug and alcohol problem, and had spent his childhood in foster care.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Concerning the nature of the instant offenses, we observe that Szabo and his accomplice drove around "looking to do a burglary." (Tr. 18.) They selected a residence where a woman was known to live alone. Before going into the residence, Szabo armed himself with a screwdriver. Once inside, the pair menaced the victim with a screwdriver, and threatened to rape her if they didn't get money. They "tore up the house" looking for money

[5] Szabo also agreed to testify against Kirkendolph, in the event that Kirkendolph proceeded to trial as opposed to pleading guilty.

and valuables. (Tr. 26.) The victim was then raped, with Szabo's acquiescence if not active participation.[6]

The character of the offender is such that prior rehabilitative efforts failed. Moreover, while he now claims to suffer from untreated substance addictions, he did not establish this at the sentencing hearing. He is not entitled to leniency on the basis of this or other circumstances not advanced at sentencing.

In light of the failure of prior rehabilitative efforts, and the brutality of the crimes, we do not find that Szabo's sentence is inappropriate.

Conclusion

Szabo has not demonstrated that the trial court erred in imposing sentence upon him, or that his sentence is inappropriate.

Affirmed.

RILEY, J., and MAY, J., concur.

[6] Szabo testified at the guilty plea hearing that he "saw [Kirkendolph] laying on top of [H.P.] and she was yelling." (Tr. 30.) Szabo initially claimed that he "went right out then." (Tr. 28.) However, the prosecutor and Szabo's counsel indicated to the trial court that the sample collected by the State from semen present on the victim's clothing contained DNA consistent with Szabo's DNA. Szabo then admitted that, "lab tests were going to get [Szabo] right there in the room" and "right near the lady." (Tr. 48.)